

MOTION FILED
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IN THE

Supreme Court of the United States
OCTOBER TERM, 1982

No. 82-945

SURE-TAN, INC., AND SURAK LEATHER COMPANY,
Petitioners

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**MOTION TO FILE SUPPLEMENTAL
AMICUS CURIAE BRIEF AND
SUPPLEMENTAL AMICUS CURIAE BRIEF
IN SUPPORT OF RESPONDENT**

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**MOTION TO SUBMIT
SUPPLEMENTAL BRIEF**

COMES NOW, the United Farm Workers of America, AFL-CIO, and moves this honorable Court to grant it leave to file a supplemental amicus curiae brief, attached hereto. This motion is based upon this notice, the declaration of Carlos Alcala, and all documents on file in this case.

DATED: 9-20-83

Respectfully submitted,
Carlos M. Alcala
CARLOS M. ALCALA

DECLARATION OF CARLOS M. ALCALA

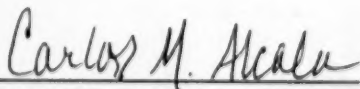
1. I am an attorney licensed to practice law before the Supreme Court of California, and am a member of the Bar of the Supreme Court of the United States.

2. I am counsel of record for the United Farm Workers of America, AFL-CIO ("UFW") who are represented also by Dianna Lyons, Federico Chavez, Ellen Eggers, Daniel Garcia, Ira Gottlieb (who prepared the brief previously submitted to this court, and the supplemental one attached hereto), and Wendy Sones.

3. On July 21, 1983, the UFW filed with this Court a motion to file an amicus curiae brief with an amicus curiae brief. The UFW therein explained the importance of this case to the union as an institution and to its membership.

4. The UFW seeks leave to file this supplemental amicus curiae brief because of the need for this Court to consider the First Amendment rights of the undocumented workers who were constructively discharged by Petitioner, in order to properly weigh the legality of Petitioner's conduct in this case.

I declare under penalty of perjury that the foregoing is true and correct and was executed on September 20, 1983 in Keene, California.


CARLOS M. ALCALA

QUESTION PRESENTED

Where an employer, whose sole intent is to infringe upon its workers' First Amendment rights to organize, choose a representative and air grievances, requests in effect that the government have such workers deported, is that communication privileged under the First Amendment where the request is not intended to influence a governmental policy decision?

SUMMARY OF ARGUMENT

For at least the entire second half of the twentieth century, it has been the law of the land that workers enjoy a First Amendment right to freedom of association at the workplace, encompassing the rights to organize, choose a representative and air grievances to their employer. Congress has provided statutory protection, and administrative procedures to ensure such protection, for the above rights and others through enactment of the National Labor Relations Act ("NLRA").

Petitioner deliberately sought to deprive its workers of such rights by requesting the Immigration and Naturalization Service ("INS") to "investigate" the immigration status of its employees; Sure-Tan knew full well that the workers, who had just voted to be represented by a union, were undocumented and subject to deportation. Petitioners' action constituted a constructive discharge.

Communication by private individuals to government entities—courts, administrative agencies, the executive branch, the legislature—has been held by this Court to be protected from antitrust sanction under the *Noerr-Pennington* doctrine. However, where such communication is aimed not at permissible persuasion, but at obstruction or manipulation of government process to deprive others of their First Amendment rights, this Court and the lower federal courts have declined to accord such conduct any privilege or immunity. The conduct this Court has previously condemned, and that of Petitioner here, are akin to common law abuse of process, in which a person may be liable for an abuse or malicious use of government process even where probable cause exists.

Consistent with this Court's decisions and policies expressed therein, the lower federal courts have distinguished for *Noerr-Pennington* purposes between communication to government intended to influence policymaking, discretionary decisions, and contacts intended to spur action of a

more ministerial or proprietary nature. They accordingly have found the former protected, and the latter unprotected. This is in keeping with the *Parker v. Brown* decision, 317 U.S. 341 (1943) as interpreted in *City of Lafayette v. La Power & Light Co.*, 435 U.S. 389 (1978), which grants antitrust immunity to a state in carrying out its sovereign (i.e., policymaking) functions, while permitting liability to attach where such functions are not involved.

Petitioners here have cynically manipulated the INS' resources to further their own anti-union ends. Petitioners had no intention of influencing INS policy, regulation or practice; they sought only to thwart their employees' right to organize, and collectively bargain, under the First Amendment, and the NRLA. Petitioners' communication to the INS was thus clearly a sham not worthy of protection as a petition for redress of grievances.

This Court's decision in *Bill Johnson's Restaurants, Inc., v. NLRB*, _____ U.S. _____, 103 S.Ct. 2161 (1983), does not aid Petitioners. The employer's conduct in the case at bar is not entitled to or deserving of the same high level of Constitutional protection as the right to file suit; Petitioners' conduct would have the tendency to chill the exercise of First Amendment rights by employees who remained in their employ, as well as destroying the rights of those discharged, without a legally cognizable countervailing interest of the employer having been served. If an employer may freely retaliate against its undocumented workers for exercising their Constitutional rights, it will be motivated to repeat such conduct in the future.¹

¹ See Note, "Retaliatory Reporting of Illegal Alien Employees: Remedying the Labor-Immigration Conflict", 80 Col.L.Rev. 1296 (1980) and Kutchins & Tweedy, "No Two Ways About It: Employer Sanctions Versus Labor Law Protections for Undocumented Workers," 5 Ind. Rel.L.J. 339, 350-62 (1983).

I

WORKERS' RIGHTS TO ORGANIZE, SELECT A BARGAINING REPRESENT- ATIVE, AND AIR GRIEVANCES ARE PROTECTED BY THE FIRST AMENDMENT

This Court and the lower federal courts have long recognized that the First Amendment protects employees who join together as a group, choose a representative, air grievances to their employers, and otherwise act jointly to promote and advance their common interests, *Thomas v. Collins*, 323 U.S. 516 (1945), *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964) *Smith v. Ark State Hi'way Employees*, 441 U.S. 463, 465 (1979), *Hanover Township Federation v. Hanover Community School Corp.*, 457 F.2d 456 (7th Cir. 1972), *Elks Grove Firefighters v. Willis*, 400 F.Supp. 1097, 1099 (N.D. Ill. 1975). Of course, those categories of employees covered by the National Labor Relations Act, 29 U.S.C. §151 et. seq., (hereinafter referred to as "NLRA" or "Act") have thereby been afforded broader protection for the concerted workplace-related activities, and may turn to a federally-established agency, the National Labor Relations Board ("NRLB" or "Board") for relief from employer-instigated unfair labor practices.

While the blossom of labor-related exercise of First Amendment freedoms would appear to have withered somewhat under this Court's interpretation of the NRLA,² the rights referred to above remain at the unassailable core of the First Amendment, *Cf. NAACP v. Claiborne Hardware*, _____ U.S. _____, 102 S.Ct. 3409, 3423 (1982).

² See Note, "Peaceful Labor Picketing and the First Amendment," 82 Col. L. Rev. 1469 (1982).

When an employer discharges its employees in retaliation for their exercise of the right to associate, a Constitutional as well as a statutory interest is implicated. Consistent with this Court's decisions with respect to the right to petition the government for redress of grievances, this Court must weigh the employees' First Amendment rights when it considers Petitioners' argument that its communication to the INS merits the invocation of the Bill of Rights. This Court stated as much in *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972), when it held that one party's exercise of its right of access to tribunals cannot result in the denial of that right to another party.

When the contentions of the parties now before this Court are juxtaposed in the light of applicable precedent, Sure-Tan's deportation signal simply does not rise to the same level of constitutional significance as even undocumented workers' right to band together in solidarity.

II

PETITIONER'S CONDUCT CONSTITUTED A SHAM NOT PROTECTED BY THE NOERR-PENNINGTON DOCTRINE

- A. The *Noerr-Pennington* Doctrine Was Established To Protect Only Conduct Intended To Influence Discretionary And/Or Policymaking Governmental Decisions

Petitioners draw on *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), *California Motor Transport Co., v. Trucking Unlimited*, 404 U.S. 508 (1972) and *Bill Johnson's Restaurant v. NRLB*, _____ U.S. _____, 103 S.Ct. 2161 (1983), for an analogy to its conduct in the case at bar. The following analysis of those and related cases, establishing and apply-

ing the "*Noerr-Pennington* doctrine," demonstrates that the conduct engaged in by Petitioners is qualitatively different from the First Amendment "petitions" the courts have shielded from civil liability.

The *Noerr-Pennington* doctrine arose out of the antitrust context. In *Noerr, supra*, truck operators sued twenty-four railroads, charging that they had violated the anti-trust laws by hiring a consultant to conduct a publicity campaign against truckers designed to foster adoption of laws and "law enforcement practices" destructive of the trucking business. It was alleged that the railroads had succeeded, *inter alia*, in persuading the Governor of Pennsylvania to veto a bill that would have permitted truckers to carry heavier loads on Pennsylvania roads. The trial court found Sherman Act violations, and the Court of Appeals affirmed. The Supreme Court reversed, declaring that no violation of the Sherman Act could be predicated upon mere attempts to influence the passage or enforcement of laws. Its rationale was twofold: a) the government can only govern properly if people have unimpaired access to their representatives and operatives to make their wishes known, even where the person has a direct pecuniary interest in the decision(s) he/she is attempting to influence; and b) the right to petition for redress of grievances is protected by the First Amendment. The Court stated that conduct "otherwise lawful" could not be violative of the Sherman Act because of the railroads' established purpose to destroy competition. Finally, the Court noted that an exception may exist to the *Noerr* rule where

a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. . . 365 U.S. at 144.

Since the trial court had found the railroads' campaign "genuine," no Sherman Act violation was found.

In *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585 (1965), the facts relevant to its applicability to Sure-Tan were that the union and certain mining employers approached the Tennessee Valley Authority in order to persuade it to curtail its spot market purchases, and the Secretary of Labor, in order to persuade him to establish minimum wages, all with the purpose of driving small mine operators out of business. Citing *Noerr*, the Court held it not unlawful to approach the government with an anti-competitive purpose.

The "sham" exception noted in *Noerr* was explicated by the Supreme Court in *California Motor Transport, supra*. In a Clayton Act suit by certain California carriers against others, it was alleged that the defendants had instituted state and federal proceedings to resist and defeat applications of plaintiffs to acquire or transfer operating rights. The district court dismissed the case, and the Court of Appeals reversed. The Supreme Court reiterated the *Noerr* rationale, and declared that the right to petition extends to administrative agencies, and all governmental departments. But the Court also noted that "First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute", 404 U.S. at 513-14, and that First Amendment rights may not be used as the means or the pretext for achieving "substantive evils" *Id.*, at 515 (citations omitted).

A combination of entrepreneurs intended to harass and deter competitors from having free and unlimited access to agencies and courts comes within *Noerr's* "sham" exception, and a Clayton Act cause of action was therefore stated. The Court stated that where the end result is unlawful, it does not matter that the means used to achieve that violation may have been lawful, *Id.* at 515.

Bill Johnson's Restaurants v. NLRB, supra, held that the

NRLB may not enjoin an employer's unpreempted, federally lawful state court suit against its employees when the suit is filed in retaliation for their use of NRLB processes, unless the suit lacks merit. "Lack of merit" signifies a suit subject to dismissal or summary judgment, or one lost or withdrawn by the plaintiff. Filing of an unmeritorious lawsuit may constitute an unfair labor practice. The Court found that while the employees had a substantial interest in Board intervention, 103 S.Ct. at 2168-69, the employer's First Amendment "right to petition" the courts outweighed their interest where the state suit had a reasonable basis.

Bill Johnson's represents this Court's view of the *Noerr-Pennington* doctrine analogously applied to a labor relations context; if the suit is retaliatory and lacks merit, it is a "sham" not worthy of First Amendment protection. If the suit has a reasonable basis, the litigation may proceed.

The *Noerr-Pennington* doctrine has been applied in federal courts in a number of contexts, see *Bradley v. Computer Sciences Corp.*, 643 F.2d 1029 (4th Cir. 1981) *cert. den.* 102 S.Ct. 476 (defendant's letter to plaintiff-government employee's superiors complaining of plaintiff's performance is privileged under First Amendment); *Stern v. U.S. Gypsum*, 547 F.2d 1329 (7th Cir.) *cert. den.*, 434 U.S. 975 (1977) (complaint similar to that in *Bradley*); *Gorman Towers v. Bogoslavsky*, 626 F.2d 607, 614-15 (8th Cir. 1980) (private citizens may lobby for unconstitutional zoning ordinance) (the *Gorman* Court lists several other cases on subject); *WIXT Television v. Meredith Corp.*, 506 F.Supp. 1003, 1025-35 (N.D.N.Y. 1980); (asserted denial of access to regulatory agencies; alleged actions did not amount to a "sham").

The cases finding communications protected under *Noerr-Pennington* and the First Amendment have the common ingredient of an appeal to a government official's discretion, independent judgment, and/or policymaking

power. That common element squares well with both *Noerr* rationales.³

Where the communicator is seeking a change in a government policy, making a complaint about the conduct of a government employee, or presenting a problem to a legislator or judicial body, a more or less formal system of advocacy is established, and the decisionmaker retains his/her discretion (guided by appropriate law) over the outcome, see *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173, 1180-81 (8th Cir. 1982). As Petitioner admits in its brief (p. 14), no discretionary decision of this nature was required of, or made by INS. Nor was the Petitioner seeking a change in regulations, law, or law enforcement practice. Petitioner, without citation, argues that its conduct rises to the level of dignity for First Amendment purposes of the filing of a lawsuit (p. 18). But several federal courts have found that the *Noerr-Pennington* doctrine was intended to protect only those communications related to decisions of a policy-making nature, *Mid-Texas Communications v. A.T. & T.*, 615 F.2d 1372, 1382 (5th Cir. 1980) ("The doctrine has been applied only to situations involving direct actions made to influence governmental decision-making"); *Woods Exploration Co., v. Aluminum Co., of America*, 438 F.2d 1286, 1296-97 (5th Cir. 1971), *George R. Whitten v. Paddock Pool Builders*, 424 F.2d 25 (1st Cir. 1970).

In *Whitten*, a manufacturer of prefabricated pool gutters was accused of conspiring to require the use of its own specifications in the public swimming pool industry, with the intent to exclude all others. In response to the manufacturer's arguments that it cannot be found liable under *Noerr-Pennington* for its attempts to influence the government, the Court stated that

³ It is in the political, legislative or litigative spheres where the government, to govern properly, must rely on information and resources outside of its immediate grasp. And it is political, legislative and litigative "speech" that is protected by the First Amendment. *In Re Airport Antitrust Litigation*, 474 F.Supp. 1072, 1079-92 (N.D. Ca. 1979), "Application of the Sherman Act to Attempts to Influence Government Action," 81 Harv. L. Rev. 847 (1968).

[t]he key to [the *Noerr*] decision, in our opinion, is the Court's heavy emphasis on the political nature of the railroad's activities and its repeated reference to the "passage or enforcement of laws." The entire thrust of *Noerr* is aimed at insuring uninhibited access to government policy makers. A pluralistic society moves by many motives. The hope, supported by history, is that permitting every interest to be heard will produce a tolerable amalgam responsive to the needs of a given time. But the efforts of an industry leader to impose his product specifications by guile, falsity, and threats on a harried architect hired by a local school board hardly rise to the dignity of an effort to influence the passage or enforcement of laws. *By "enforcement of laws" we understand some significant policy determination in the application of a statute, not a technical decision about the best kind of weld to use in a swimming pool gutter, 424 F.2d at 32. (emphasis added)*

This interpretation of the reach of the *Noerr-Pennington* doctrine is congruent with this Court's "sovereign immunity" rulings in the antitrust arena, *Parker v. Brown*, 317 U.S. 341 (1943) and *City of Lafayette v. La Power & Light Co.*, 435 U.S. 389 (1978). *City of Lafayette* held that since a state cannot be liable under the antitrust laws where it has deliberately established an anti-competitive policy, neither can a municipality be liable for carrying out such a policy. However, where the municipality acts in a proprietary capacity, as another competitor in the marketplace, it is not immune from antitrust attack.

The sovereign-proprietary distinction supports the parallel distinction made above. *Noerr* noted that lawful results could not be made unlawful because of an anti-competitive purpose. The only reason the results are lawful in many of the cases is because of government involvement in the action, or the state's imprimatur on the results. (It will be recalled that *Trucking Unlimited* declared that lawful means will not excuse unlawful results). If govern-

ment involvement is the immunizing element, then that involvement ought to be the product of independent judgment of government officials. A judge will not implicate him or herself as an antitrust conspirator simply by presiding over a baseless action, or series of actions;⁴ yet under *Trucking Unlimited*, the proponent, solicitor or financier of such actions may properly be liable, *Landmarks Holding Corp., v. Bermant*, 664 F.2d 891 (2d Cir. 1981).

As noted above, Petitioners did not seek to have any INS agent exercise his/her discretion. While the INS itself did nothing unlawful, their participation in the constructive discharge at Sure-Tan's behest cannot shield Sure-Tan from responsibility for the unfair labor practice that resulted.

B. Petitioner's Attempt To Manipulate The INS To Carry Out Its Unconstitutional Purpose Was A Sham, Akin To An Abuse of Process

The manipulation of a legal process for an ulterior motive not directly related to the ostensible purpose of that process is a common law abuse of process, 72 C.J.S. §120. Sure-Tan has engaged in an analogous abuse here.⁵ It set in motion the deportation of its employees for a purpose unrelated to the offense committed by the undocumented workers: it sought to rid itself of a union and discourage its employees from exercising the rights guaranteed them by the Constitution and the NLRA. Sure-Tan's purpose here was not merely *unrelated* to the triggering of INS' "investi-

⁴ It should be noted that it has been held that a multiplicity of baseless actions is not necessarily to come within the sham exception, *Clipper Express v. Rocky Mtn. Tariff*, 674 F.2d 1252, amended 690 F.2d 1240 (9th Cir. 1982).

⁵ *Bill Johnson's* was implicitly founded on the malicious prosecution doctrine, which is distinct from abuse of process. Malicious prosecution requires a lack of probable cause to bring the underlying action, and the commencement of the malicious prosecution suit can only come at the termination of the underlying case. An abuse of process suit does not depend on lack of probable cause; its gravamen is the ulterior motive unrelated to the purpose for the process.

gative" procedures, it was patently unlawful. While *Noerr-Pennington* protects an unlawful purpose resulting in lawful ends, neither *Noerr-Pennington* nor the analogous commonlaw doctrine of abuse of process in Illinois tolerates an unlawful purpose resulting in an unlawful result,⁶ see *Barrett v. Baylor*, 457 F.2d 119, 122-23 (7th Cir. 1972).

⁶ See Note, "Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process," 86 Harv. L. Rev. 715 (1973).

CONCLUSION

The First Amendment was intended to promote the free flow of ideas; untrammelled information distribution should lead to a more responsive government and a more responsible public. The individual components of the First Amendment—free press, free expression, free association, freedom to petition—are all intended to serve these great goals. When they come into conflict, it stands to reason that the interest closest to the core of First Amendment values must prevail.

In a contest between employees associating to inform and advise each other, with the purpose of mutual protection and airing of grievances, and an employer unlawfully calling upon the government to prevent such association, it is clear that the employees have a stronger Constitutional claim. Accordingly, the Court of Appeals decision below must be **AFFIRMED**.

DATED: 9-20-03

Respectfully submitted,

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